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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 618

JEROME H. MOORE and MILDRED V. MOORE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion and supplemental opinion of the court of appeals (Pet. 24-29, 30-32) are reported at 360 F. 2d 353. The opinion of the district court (Pet. 13-22) is reported at 235 F. Supp. 387.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1). The question whether the petition for a writ

of certiorari was timely filed is discussed in the Argument, *infra*, at pp. 4-7.

QUESTIONS PRESENTED

1. Whether the petition for a writ of certiorari was timely filed.

2. Whether petitioner's prior criminal conviction for wilfully attempting to evade his taxes collaterally estops him from contesting the imposition of a 50 percent civil fraud penalty for those same years.

3. Whether a stipulation in a criminal trial as to the amount of tax owed by petitioner collaterally estops the government in a subsequent civil action from proving that his actual tax liability was greater.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6653. FAILURE TO PAY TAX.

* * * *

(b) *Fraud.*—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a).

* * * *

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty

of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

On December 18, 1961, Mr. Moore [1] was criminally convicted of wilfully attempting to evade and defeat his income taxes for the years 1955 through 1958 (R. 78-81).[2] During the criminal investigation petitioners amended their original 1955-1958 income tax returns and paid additional taxes. Thereafter, petitioners brought the instant action for a $13,509.64 refund on their 1955-1958 income taxes (R. 23, 26-28, 31). The government counterclaimed for additional taxes and fraud penalties for each year totalling $24,687.51 (R. 55-59).

Petitioners based their entire claim for refund upon their contention that a stipulation entered into in the criminal case as to the amount of their income collaterally estopped the government from claiming that their income had actually been higher. The government based its claim for fraud penalties solely upon its contention that Mr. Moore's prior criminal conviction collaterally estopped petitioners from contesting the imposition of the civil fraud penalties. The district court held that neither party was collaterally

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[1] Mr. Moore is the principal taxpayer; his wife is a party because she filed joint income tax returns with her husband for the years involved.

[2] "R." references are to the appendix to the government's opening brief in the court of appeals.

estopped by what had occurred in the criminal case (R. 88-98). The court of appeals agreed that the government was not collaterally estopped by the stipulation but held that Mr. Moore's criminal conviction collaterally estopped him from contesting his fraud in the present civil proceeding. While the court of appeals originally held that Mrs. Moore was also estopped from contesting her husband's fraud because of his prior criminal conviction, it thereafter concluded that she was not collaterally estopped. The government has not petitioned for certiorari on this question and therefore the court's holding as to Mrs. Moore is not before this Court.

ARGUMENT

1. Although the question is not free from doubt, it would appear that the petition for a writ of certiorari was filed out of time.

The original judgment of the court of appeals—based on the court's holding that both husband and wife were collaterally estopped on the fraud penalties was entered on December 7, 1965 (Pet. 29). On January 13, 1966, the court of appeals *sua sponte* issued an order requesting supplemental briefs on whether the wife was collaterally estopped and "recall[ing] our mandate to the district court as it relates to Mrs. Moore, adhering to our decision as to Mr. Moore." On February 11, 1966, the court ordered "that the mandate as it relates to Jerome H. Moore be, and it is hereby, recalled, and that the mandates be stayed pending further proceedings in this Court."

On April 29, 1966, the court of appeals issued a supplemental opinion (Pet. 30-32), holding that collateral estoppel does not apply to the wife, and in that opinion the court stated (Pet. 30-31)—

> Upon further consideration, however, we recalled our mandate to the District Court as it related to Mrs. Moore, suggesting that perhaps she should be allowed to litigate the question of Mr. Moore's fraud if she so desires; although for the reasons stated in the original opinion, we remained of the view that the husband is estopped by his conviction in the criminal case from contesting the finding of fraud on his part.[1]

[1] We also recalled our mandate as it related to Mr. Moore, so as to preserve the opportunity for the taxpayers later to file consolidated petitions to the Supreme Court for a writ of certiorari, if that should become necessary.

On April 29, 1966, the Fourth Circuit entered a new judgment based on this supplemental opinion, remanding the cause as it related to Mrs. Moore to the district court (Pet. 33). On May 24, 1966, the court modified this judgment and remanded the entire cause to the district court (Pet. 34). The government's timely petition for rehearing as to Mrs. Moore was denied on June 22, 1966 (Pet. 35).

On September 15, 1966, petitioners applied for an extension of time for filing a petition for certiorari to and including September 30, 1966. This motion was granted by the Chief Justice "without prejudice to the Court's consideration of whether this application has been filed in time." The petition was filed on September 30, 1966.

Two questions of timeliness are raised. First, it must be observed that the present petition raises two issues—whether Mr. Moore's prior criminal conviction estopped him from contesting his fraud and whether the government was estopped as to the amount of the deficiency by the stipulation in the criminal case. Both of these issues were finally and completely settled in the court of appeals' original opinion and were not at all involved in the subsequent "*sua sponte* rehearing" which related solely to the application of collateral estoppel to Mrs. Moore. Although Judge Sobeloff recalled the court of appeals' mandate as to Mr. Moore on February 11, 1966, apparently believing that this would stop the running of certiorari time, it is well settled that the time for filing a petition for a writ of certiorari runs from the date of judgment, not the date of the mandate. *Boylan* v. *United States*, 257 U.S. 614; Stern and Gressman, *Supreme Court Practice* (3d ed., 1962), pp. 203-204. Thus it would appear that Mr. Moore's time for filing a petition for certiorari expired on March 7, 1966 (*i.e.*, 90 days after the original judgment of December 7, 1965).

Moreover, even if staying the mandate had been effective to toll the running of certiorari time, the court of appeals entered its final judgment after the *sua sponte* rehearing on April 29, 1966 (or, at the latest, on May 24, 1966, when the new judgment was modified). The government's subsequent petition for rehearing was concerned only with whether Mrs. Moore was collaterally estopped and was not ad-

dressed to either of the issues raised by petitioners herein. Thus, the reasoning in this Court's opinion in *F.T.C.* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, would indicate that the government's petition for rehearing did not toll the certiorari time as to the issues presented in the instant petition. See Stern and Gressman, *supra*, pp. 206-207; cf. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177; *Johnson* v. *Eisentrager*, 339 U.S. 763; but see *Zimmern* v. *United States*, 79 F. 2d 703 (C.A. 5), reversed on other grounds, 298 U.S. 167. If this reasoning is correct, petitioners' certiorari time expired on or before August 22, 1966. Since their application for an extension of time was not filed until September 15, 1966, the petition was apparently filed out of time.

2. The court of appeals held that a person who has been convicted of a willful attempt to evade and defeat a tax (*i.e.*, criminal tax fraud) is collaterally estopped from contesting the assessment of civil fraud penalties for the same years. This decision is plainly correct; there is no conflict of appellate decisions or other ground for further review. This Court has long held that an issue resolved in the government's favor in a criminal case is foreclosed to further litigation in a subsequent civil action between the same parties. *Local 167* v. *United States*, 291 U.S. 293, 298-299; see *Emich Motors* v. *General Motors*, 340 U.S. 558, 568-569.[3] That principle is fully applicable here. As

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[3] By the same token, this Court has held that an issue decided against the government in a criminal case may be relitigated in a subsequent civil action because of the higher

the court of appeals held (Pet. 25-27), a finding of willful attempt to evade and defeat a tax within the prohibition of § 7201 of the 1954 Code, *supra*, pp. 2-3, necessarily includes the elements of "fraud" required under § 6653(b), *supra*, p. 2. Both sections require that the taxpayer have an intent to prevent the government from determining and assessing a taxpayer's correct liability for taxes, the only difference being that the criminal prosecution requires a stronger showing of evil motive. *Spies* v. *United States*, 317 U.S. 492; compare *United States* v. *Martell*, 199 F. 2d 670, 672 (C.A. 3), certiorari denied, 345 U.S. 917, with *Davis* v. *Commissioner*, 184 F. 2d 86, 87 (C.A. 10). Conviction under the tax evasion provision of the criminal statute therefore constitutes an adjudication that there was a deficiency due at least in part to fraud.[4]

All courts which have considered this question have upheld the government's position. *Tomlinson* v. *Lefkowitz*, 334 F. 2d 262 (C.A. 5), certiorari denied, 379 U.S. 962; *Armstrong* v. *United States*, 354 F. 2d 274, 289-291 (Ct. Cl.); *Amos* v. *Commissioner*, 43 T.C. 50, affirmed, 360 F. 2d 358 (C.A. 4). And all, including

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standard of proof required in a criminal prosecution, *Helvering* v. *Mitchell*, 303 U.S. 391.

[4] It is settled that the government must prove the existence of a substantial deficiency in order to convict a taxpayer of willful attempt to evade and defeat his taxes. *United States* v. *Moody*, 339 F. 2d 161, 162 (C.A. 6); *Jones* v. *United States*, 282 F. 2d 745, 747 (C.A. 4). The taxpayer is free, of course, to challenge the precise amount of the deficiency in the civil case because that was not the gist of the criminal offense. *United States* v. *Johnson*, 319 U.S. 503, 517.

the court below, have rejected the contention made by Mr. Moore in the instant case (Pet. 8) that this Court's decision in *United States* v. *Scharton*, 285 U.S. 518, has any relevance to the situation at bar. In the *Scharton* case this Court, in determining that a provision extending the statute of limitations to six years in cases involving defrauding the United States did not apply to a predecessor of § 7201, used the narrow construction traditional in dealing with criminal limitation statutes, holding (285 U.S. at 522):

> And as the section has to do with statutory crimes it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds *not so denominated* by the statutes creating offenses. *United States* v. *Hirsch*, 100 U.S. 33; *United States* v. *Rabinowich*, 238 U.S. 78, 87-88; *United States* v. *Noveck*, *supra*; *United States* v. *McElvain*, *supra*. The purpose of the proviso is to apply the six year period to cases "in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense." *United States* v. *Noveck*, *supra*. [Emphasis supplied.]

Thus it is clear that this Court was not concerned with and did not decide whether the willful behavior proscribed by the criminal statute *in fact* included fraud.[5]

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[5] Moreover, as the court of appeals pointed out (Pet. 27-28), subsequent decisions of this Court have cast grave doubts upon the vitality of even the Court's narrow holding in *Scharton*. See *United States* v. *Grainger*, 346 U.S. 235, 244; *Helvering* v. *Mitchell*, 303 U.S. 391, 398.

Nor is Mr. Moore aided by his contention (Pet. 9-11) that the application of collateral estoppel against him is improper because under the court of appeals' supplementary opinion his wife is not also bound. Even if that decision were correct, it helps, rather than hurts, petitioners, and thus they are not prejudiced or aggrieved by it.

3. Petitioners' contention (Pet. 5-7) that the government is collaterally estopped by the stipulation entered into in the criminal case (R. 37-48) is patently without merit. An examination of the stipulation shows that it was to "be accepted as agreed statements of fact and as evidence *in this case*" (R. 37; emphasis supplied). Moreover, the stipulation in the civil case explains that the criminal stipulation dealt only with items of income completely omitted from petitioners' returns and not with non-allowable deductions and ordinary income erroneously reported as capital gain (R. 87). As the district court found (Pet. 17), the reason for this is clear: In the criminal case the government sought to prove only those items which resulted from Mr. Moore's fraud, and those additional understatements of income which were innocent or negligent were left to the instant civil suit.[6]

Moreover, collateral estoppel includes only facts "essential to the judgment." *Commissioner* v. *Sunnen*, 333 U.S. 591, 601; *Emich Motors* v. *General Motors*, *supra*. It is well established that determining the pre-

[6] The stipulation in the civil case also states that, at the time the stipulation in the criminal case was prepared, there were no discussions regarding settlement of civil liability (R. 87).

cise amount of the deficiency is not *essential* to a conviction in a criminal tax evasion case. *United States* v. *Johnson*, *supra*; *Katz* v. *United States*, 321 F. 2d 7, 11 (C.A. 1), certiorari denied, 375 U.S. 903; *Gendelman* v. *United States*, 191 F. 2d 993, 996 (C.A. 9), certiorari denied, 342 U.S. 909; *United States* v. *Schenck*, 126 F. 2d 702, 704 (C.A. 2), certiorari denied *sub nom. Moskowitz* v. *United States*, 316 U.S. 705; *Gleckman* v. *United States*, 80 F. 2d 394, 401 (C.A. 8), certiorari denied, 297 U.S. 709; *Tinkoff* v. *United States*, 86 F. 2d 868, 878 (C.A. 7), certiorari denied, 301 U.S. 689. Thus such a stipulation as to the amount of a deficiency in a criminal tax evasion case cannot collaterally estop the government from asserting a different amount in a subsequent civil case.

CONCLUSION

The petition for a writ of certiorari should either be dismissed as untimely or denied.

Respectfully submitted.

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